In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1044

CLINTON H. MITCHELL, AND CLINTON MITCHELL FOUNDATION, APPELLLANTS

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

Pursuant to Rule 16(1)(a), appellees move to dismiss this appeal. Treating the appeal as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103, the writ should be denied.

QUESTIONS PRESENTED

1. Whether the clause of 28 U.S.C. 2201 excepting matters with respect to federal taxes from the provisions of the Declaratory Judgment Act is unconstitutional?

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2. Whether Section 7422(f) of the Internal Revenue Code of 1954, which provides that an action for refund may be maintained only against the United States and not against any officer or employee of the United States, and Section 7423 which provides for repayment to officers or employees of the United States for sums of money recovered against them in court for any internal revenue taxes collected by them, or damages recovered against them by reason of anything done in the performance of their official duty are unconstitutional?

STATUTES INVOLVED

28 U.S.C. 2201:

Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Internal Revenue Code of 1954:

SEC. 7422 [as amended by Sec. 3(a), Act of November 2, 1966, P. L. 89–713, 80 Stat. 1108]. CIVIL ACTIONS FOR REFUND.

* * * * *

(f) *Limitation on Right of Action for Refund.*—

(1) *General rule.*—A suit or proceeding referred to in subsection (a) may be main-

tained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue).

* * * * *

(26 U.S.C. 7422.)

SEC. 7423. REPAYMENTS TO OFFICERS OR EMPLOYEES.

The Secretary or his delegate, subject to regulations prescribed by the Secretary or his delegate, is authorized to repay—

(1) *Collections recovered.*—To any officer or employee of the United States the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also

(2) *Damages and costs.*—All damages and costs recovered against any officer or employee of the United States in any suit brought against him by reason of anything done in the due performance of his official duty under this title.

(26 U.S.C. 7423.)

STATEMENT

Appellant Clinton H. Mitchell, appearing *pro se* and on behalf of the appellant Mitchell Foundation, brought an action in the United States District Court for the Southern District of California, seeking the

refund of $10 he had voluntarily paid to the Internal Revenue Service, although no tax deficiency had been determined. The avowed purpose of the action was to obtain a determination that the Mitchell Foundation was exempt from federal income taxes (J.S. A3).[1] After the Internal Revenue Service refunded the $10 to Mitchell, he sought to continue the litigation as an action for declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. 2201.

The district court concluded that the action should be dismissed because it lacked jurisdiction over the subject matter, noting that the Declaratory Judgment Act by its terms applies only to "a case of actual controversy * * * except with respect to Federal taxes * * *" (J.S. A6–7). The court of appeals, after adding the United States as a party, affirmed. (J.S. A 1–10.)

ARGUMENT

1. The appeal should be dismissed. Because the court of appeals has sustained the constitutionality of Acts of Congress, and no State statute is involved (J.S. 1–3), this case does not come within any statu-

[1] In his complaint, Clinton Mitchell stated that he established an intervivos trust retaining management in himself and designating that the entire net income, except for specified life interests retained by him, be paid exclusively for charitable purposes. He sought the approval of the Internal Revenue Service of his foundation as a tax-exempt organization (presumably under Section 501(c)(3), although this section is not specified in his complaint) and asked further that his foundation be allowed a deduction for amounts set aside by the governing instrument of an estate or trust for exclusively charitable purposes pursuant to Section 642 of the Code. (R. 2–5.)

tory provision allowing direct appeal of a court of appeals decision to this Court. See 28 U.S.C. 1256, 1254(2).

2. Treating the appeal as a petition for a writ of certiorari, 28 U.S.C. 2103, there is no question warranting further review. The United States, as sovereign, is immune from suit save as it consents to be sued. *United States* v. *Sherwood,* 312 U.S. 584, 586. There is no constitutional requirement that the United States consent to actions against it for declaratory judgments. The general question of whether the Declaratory Judgment Act applies to actions against the United States is now before the Court in *United States* v. *King,* No. 672, this Term. But whatever may be the outcome of *King,* the statute by its express terms forecloses declaratory judgments in tax controversies such as this. As this Court noted in *Great Lakes Co.* v. *Huffman,* 319 U.S. 293, 301, the 1935 amendment excluding all cases involving federal taxes from the operation of the Declaratory Judgments Act, "was passed merely for the purpose of 'making it clear' that the Declaratory Judgments Act would not permit 'a radical departure from the long-continued policy of Congress' to require prompt payment of federal taxes. See S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11; H.R. Rep. No. 1885, 74th Cong., 1st Sess., p. 13."

Congress has provided full and adequate remedies for the settlement of federal tax controversies, which are available to appellants. If they desire to obtain a judicial determination as to the tax status of the

Foundation, they may file income tax returns for the Foundation claiming exemption. The statute of limitations will then begin to run with respect to assessment of any deficiency. See Section 6501 of the 1954 Code, 26 U.S.C. 6501. If a deficiency is asserted against the Foundation, judicial review may be obtained by paying the tax and following the prescribed refund procedures, or by seeking a redetermination in the Tax Court. See Sections 6213, 6532, and 7422 of the 1954 Code, 26 U.S.C. 6213, 6532, 7422. In addition, there would be no justiciable controversy unless and until a deficiency is asserted.

3. Appellants' second argument, *i.e.*, that Sections 7422(f)(1) and 7423 of the Internal Revenue Code of 1954 are unconstitutional because they make federal officials immune from any suit or penalty for wrongdoing, is not well taken. Section 7422(f)(1) does not deprive any taxpayer of any substantial right in requiring that his action for refund of taxes must be brought against the United States rather than the officers or employees who collected it, nor is any taxpayer's economic position altered by the provision in Section 7423(1) for reimbursement of those officers who formerly had taxes recovered from them.

CONCLUSION

The appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, the writ should be denied.

Respectfully submitted.

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MARCH 1969.